

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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FRED GENTNER and  
ROBERT STEVENSON,

Plaintiffs,

v.

CHEYNEY UNIVERSITY OF  
PENNSYLVANIA,

Defendant.

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CIVIL ACTION NO. 94-7443

MEMORANDUM

R.F. KELLY, J.

OCTOBER 14, 1999

In September of 1998, a second trial was held in this Title VII reverse discrimination case on claims that Defendant Cheyney University engaged in discriminatory retaliation resulting in the constructive discharge of Plaintiffs Fred Gentner and Robert Stevenson. At the close of trial, the jury rendered a verdict in favor of Plaintiffs, awarding the former science professors in excess of two million dollars.<sup>1</sup>

Subsequently, the parties filed several post-trial motions which are now pending before this Court.<sup>2</sup> These post-trial motions include Plaintiffs' Motion to Vacate this Court's Order, dated

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<sup>1</sup> The jury awarded Plaintiff Gentner \$488,789.00 in front pay, \$306,677.00 in back pay, and \$405,000.00 in compensatory damages. The jury awarded Plaintiff Stevenson front pay of \$200,006.00, back pay of \$372,778.00, and compensatory damages of \$405,000.00.

<sup>2</sup> Consideration of these motions was delayed pending extensive efforts by the parties to reach a post-trial settlement.

10/1/98, and Defendant's Motion for Judgment As A Matter Of Law, Or For A New Trial, Or To Alter Or Amend The Judgment. For the following reasons, Plaintiffs' post-trial motion will be granted, and Defendant's motion will be denied.

**I. STANDARD OF REVIEW**

In analyzing a post-trial motion for judgment as a matter of law, the court must view the record in the light most favorable to the verdict winner, and determine if the record is critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief. Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1095 (3d Cir. 1995) (quotations and citations omitted); see also Andrews v. City of Philadelphia, 895 F.2d 1469, 1478 (3d Cir. 1990).

Such a motion should be granted only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability. In determining whether the evidence is sufficient to sustain liability, the court may not weigh the evidence, determine the credibility of witnesses, or substitute its version of the facts for the jury's version. Although judgment as a matter of law should be granted sparingly, a scintilla of evidence is not enough to sustain a verdict of liability. "The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party."

Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1166 (3d Cir. 1993) (citations omitted). "In other words, the court must

determine whether a reasonable jury could have found for the prevailing party." Starceski, 54 F.3d at 1095.

## **II. PROCEDURAL HISTORY**

This case was originally tried to a jury in April of 1996. With respect to Plaintiffs' claims under 42 U.S.C. § 1983, the jury found in favor of Plaintiffs. More specifically, the jury found that Plaintiffs proved by a preponderance of the evidence that their complaints regarding Cheyney's hiring practices was a substantial or motivating factor in the individual defendants, Drs. Jones and Chang, taking adverse action (retaliating) against Plaintiffs for speaking out. As a result, the jury awarded compensatory damages of \$100,000 to Fred Gentner and \$50,000 to Robert Stevenson. In addition, the jury awarded punitive damages of \$100,000 to Fred Gentner and \$50,000 to Robert Stevenson.

However, with respect to Plaintiffs' claims of discriminatory retaliation under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3 ("Title VII"), the jury issued inconsistent answers to special verdict interrogatories. Although the jury concluded that Plaintiffs were constructively discharged subsequent to their exercise of free speech in complaining about Cheyney's hiring practices, the jury's finding that Cheyney did not retaliate against Plaintiffs for opposing Cheyney's hiring practices was inconsistent with a finding that a causal link existed between Plaintiffs' protected conduct and Cheyney's adverse action. Despite the above, the

jury found Cheyney liable for Title VII damages of \$125,000 to Fred Gentner and \$225,000 to Robert Stevenson.

Then, in response to Defendants' post-trial motions for judgment notwithstanding the verdict, or, alternatively, for a new trial, this Court issued a Memorandum and Order, dated September 17, 1996, denying Defendants' motion with respect to Plaintiffs' § 1983 claims, but granting a new trial with respect to Plaintiffs' Title VII claims. See Gentner v. Cheyney University, No. CIV. A., 1996 WL 525323 (E.D. Pa. Sept. 17, 1996).

Prior to the second trial, numerous motions were filed by both parties, including cross-motions for summary judgment. By Memorandum and Order, dated August 25, 1997, this Court granted Plaintiffs' motion only with respect to the application of collateral estoppel to the jury's § 1983 verdict. Gentner v. Cheyney University, No. CIV. A. 94-7443, 1997 WL 529058, (E.D. Pa. Aug. 25, 1997). In doing so, this Court gave preclusive effect to the Plaintiffs' showing that their exercise of free speech in opposing Cheyney's hiring practices was a substantial or motivating factor in the individual defendants (Jones and Chang) taking retaliatory action against Plaintiffs for their speech, and that Drs. Jones and Chang acted intentionally and with a malicious motive or reckless indifference toward Plaintiffs. Id. at \*4-5.

On September 3, 1998, this Court entertained oral

argument on certain pretrial motions, including a motion by Plaintiffs to enforce the collateral estoppel effect of Plaintiffs' successful § 1983 verdict from the first trial and a motion by Defendant regarding duplication of damages. At an in-camera conference with the parties, this Court requested that the parties pose a solution to the potential problem of Plaintiffs receiving duplicative damages. After different options were explored, Plaintiffs agreed to a \$150,000 reduction in compensatory damages if they prevailed under Title VII. As a result, the following was placed on the record:

THE COURT: Mr. Frost, do you want to -- this is with respect to the problem that the Court has raised with respect to an overlap in damages when considering the award that was made in the first trial for 1983, and the possible award in this upcoming trial, under Title 7. Mr. Frost?

MR. FROST: Judge, plaintiff[s], if they are successful on liability and there's award of damages under Title 7, will file post trial motions at that time, Judge, reducing the verdict under the Title 7 claims to be reduced by the amount of the compensatory damages only verdict in the first claim, which was \$150,000.00. And we will so move.

Also Judge, we will prepare jury interrogatories, either submitted by plaintiff[s] or submitted also by defendants. But in those jury interrogatories, we will break down under the Title 7 claims, the claims for damages that we are seeking. And they will be in three categories. They will be in front pay, back pay, and those that would amount to pain and suffering, compensatory damages.

So, we would have -- those three categories will be broken down with respect to the jury interrogatories, if, in fact, the jury does find liability against Cheyney University. And we are agreeable to do that in the proposed jury interrogatories to the Court.

Judge, also - I mean this is done clearly without waiving any of the parties' rights for any post trial motions or appellate rights that they may have with respect to this case.

THE COURT: And - but that offer, you're excluding punitive damage from that.

MR. FROST: Yes, we are. That is not - that - with respect to the 1983 awards, so the record is clear and your Honor is clear, that we are not foregoing any of the punitive damages awards of \$150,000, which was 100,000 to Mr. Gentner, \$50,000 to Professor Stevenson. We're not waiving that or giving that up. And additionally, we're not giving up any liability aspects of findings by the jury in the first matter.

MR. LUDWIG: Your Honor, the defendant, Cheyney University of Pennsylvania, has a motion in limine pending which was filed last year, where the defendant asserted the view that the only damage claim that should be at issue on the retrial against Cheyney University with respect to Title 7 are compensatory damages, solely attributable to Cheyney University.

And we have asked the Court to instruct the jury consistent with its decisions issued with respect to the pretrial motions and the cross-motions for summary judgment which were filed with the Court.

We acknowledge the concerns raised by the Court this morning concerning the potential overlap of the damage claims.

And I'd just set out for the record that we do not agree with the decision that front pay and back pay should be submitted to the jury. But there's no question that this matter will proceed next week, with respect to Title 7 claims against Cheyney University of Pennsylvania.

THE COURT: While we're at it, that motion is denied. All right. What next motion - I would like at this time to take up the motions in limine, unless you have something else to take up.

Hearing Transcript, dated 9/3/98, at pp. 2-4.

On September 6, 1998, the parties met again in chambers to discuss the application of collateral estoppel to the second trial, at which time this Court indicated that giving preclusive effect to the § 1983 verdict from the first trial could not practically be applied to the retrial. As a result, a one-day adjournment of the second trial was granted so that counsel for Plaintiffs could have more time to prepare additional evidence which was now necessary in light of this Court's reconsideration of the previous ruling on the application of collateral estoppel.

On September 23, 1998, the jury in the second trial rendered a verdict in favor of Fred Gentner and against Cheyney University in the sum of \$1,200,466.00 and in favor of Robert Stevenson against Cheyney University in the sum of \$977,784.00.

Now, Defendant has moved pursuant to Rules 50(b), 59(a), and 59(e) of the Federal Rules of Civil Procedure for judgment as a matter of law in its favor or for a new trial. In

the alternative, Defendant has moved for alteration or amendment of the judgment to reflect the statutory limitation on damages set forth in 42 U.S.C.A. § 1981a(b)(3), and has challenged the submission of back and front pay issues to the jury as improper, asking for remittitur. The following grounds have been advanced in support of Cheyney's post-trial motion:

1. This Court lacks subject matter jurisdiction over Plaintiffs' claims against Defendant because Cheyney University, as a matter of law, was not Plaintiffs' "employer" within the meaning of Title VII<sup>3</sup>;

2. There was no evidentiary basis for a jury to find that Plaintiffs engaged in activity protected under Title VII and, thus, the trial court improperly instructed the jury, over the Defendant's objection, that Plaintiffs engaged in protected activity relating to the Fall, 1991 search or any search;

3. Plaintiffs did not prove that they were constructively discharged -- that they were subjected to any "conditions of discrimination" and that Cheyney "knowingly permitted conditions of intolerable discrimination";

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<sup>3</sup> On January 27, 1998, this Court denied Cheyney's Motion to Dismiss for Lack of Subject Matter Jurisdiction. In doing so, this Court found that Cheyney admitted in its answer that it was an employer within the meaning of Title VII, and that Cheyney's factual admission served, in part, to establish this Court's jurisdiction and, thus, was binding upon the University. Gentner v. Cheyney University, Civ. A. No. 94-7443, 1998 WL 32652, \*2 (E.D. Pa. Jan. 27, 1998); see also N.T., dated 9/10/98, at 91-92.



4. There was no evidence showing that Cheyney was negligent for purposes of liability for retaliation under Title VII;

5. There was no evidence of a causal link between any protected activity and the alleged retaliatory constructive discharges;

6. There was not sufficient evidence for a jury to find Cheyney liable under Title VII as a result of management-level employees' actions or inactions in creating a hostile work environment for purposes of retaliation;

7. Cheyney cannot be vicariously liable for Dr. Jones' actions or inactions because he is not a supervisor;

8. The trial court erred by either permitting certain prejudicial evidence or improperly instructing the jury as follows:

a. The trial court should not have permitted evidence of alleged age discrimination;

b. The trial court should not have permitted evidence of actions by Dr. Imogene Chang and improperly instructed the jury that she may have engaged in unlawful conduct;

c. The trial court should not have permitted evidence from or about Colleen "Connie" Sivieri;

d. The trial court should not have permitted

certain evidence from Fred Tucker about Dr. Eugene Jones;

e. The trial court should not have permitted evidence of back pay and front pay damages;

f. The trial court improperly instructed the jury, over the Defendant's objection, about the standards for determining who is a supervisor for purposes of Title VII;

g. The trial court erred in refusing to instruct the jury as requested by Defendant that each Plaintiff was required to prove that he engaged in a protected activity<sup>4</sup>;

h. The trial court erred by permitting testimony about alleged anonymous acts of vandalism and telephone calls and the prejudicial effect of such testimony could not be overcome by the court's instruction to the jury to disregard such statements;

i. The trial court erred in permitting testimony from Plaintiffs' expert, Royal Bunin;

j. The trial court should not have submitted the issues of front and back pay to the jury; and

9. The trial court should alter or amend the judgment to apply the statutory limit on damages set forth in 42 U.S.C. § 1981a(b)(3) to reduce the total amount of compensatory damages

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<sup>4</sup> A review of this Court's opening instructions to the jury shows that the charge of the Court did instruct the jury that "[i]n a civil case such as this one, each plaintiff has the burden of proving those contentions which entitle him to relief and there are two separate plaintiffs in this case." (N.T., dated 9/23/98, at 3-4).

and front pay to \$200,000.00 per Plaintiff, as well as take into account the damages awarded in the 1996 trial.

In addition, Plaintiffs have filed a motion to vacate this Court's Order, dated October 1, 1998, challenging the capping of the jury's award on front pay to the Plaintiffs. Each of the above arguments will be addressed in turn.

### **III. FACTUAL BACKGROUND**

Cheyney University is located in Chester County, Pennsylvania. Ninety-eight to ninety-nine percent of the undergraduate student body at Cheyney is African-American. (N.T., dated 9/15/98, p. 8). Cheyney's faculty consists of approximately sixty-five percent minorities. (N.T., dated 9/15/98, at 9, 57).

At all times relevant hereto, there were a variety of vacant administrative positions at Cheyney. (N.T., dated 9/10/98, at 32). In the Spring of 1992, after the Acting President, Valerie Swain, left the University, the only administrator above the level of Department Chair was an Acting Vice President for Academic Affairs, Dr. Eugene Royster. Id. Thus, the department chairs were the only actual continuous positions that were of a supervisory nature in Cheyney's academic areas. Id. at 33.

Plaintiffs are former science professors at Cheyney University. Fred Gentner, after being solicited by Cheyney to

develop a physics program in 1963, was continuously employed as a Professor at Cheyney until his employment ended in 1992. Dr. Robert Stevenson joined the Cheyney staff as a chemistry professor in 1969 and later became a Chairperson of the Physical Science Department from 1974 to 1975 and in the mid 1980's. Both Plaintiffs are caucasian.

Due to budget constraints and declining enrollment at Cheyney, all science faculty, including Plaintiffs, were consolidated into the Department of Allied Health and Science. The Chairman of this department was Dr. Eugene Jones.<sup>5</sup> Plaintiffs had no problems with Dr. Jones during his first year as Chair from 1990 to 1991.

In the Fall of 1991, a search committee within the Science and Allied Health Department was formed with the goal of hiring three new professors to fill vacancies at Cheyney as a result of retirements and attrition.<sup>6</sup> (N.T., dated 9/10/98, at 175). Three candidates were recommended by the search committee to the entire department. Professor Anderson, who was chairman of the search committee, voted against his committee's recommendation of candidates and another member of the search

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<sup>5</sup> At trial, Plaintiffs established that Dr. Jones believed that in order for Cheyney University students to receive a proper education, they should have African-American faculty. (N.T., 9/10/98, at 41; N.T., dated 9/15/98, at 8-10).

<sup>6</sup> The search committee consisted of Professor Thomas Anderson, Professor Ianni, and Dr. Imogene Chang.

committee, Professor Ianni, abstained. (N.T., dated 9/10/98, at 176-77). After the unusual vote, Plaintiffs approached Professors Ianni and Anderson to discuss their voting and learned that Drs. Chang and Jones had coerced the other search committee members to alter their scoring system so that Dr. Hernandez (a white male) who had been chosen for the job would be dropped and Dr. Jenny Hsu (an Asian woman) would be substituted. (N.T., dated 9/10/98, at 178-80; N.T., dated 9/16/98, at 76-83).

Subsequently, Plaintiffs, along with Professor Anderson, complained to Harding Faulk, Cheyney's Affirmative Action Officer, regarding the employment search. (N.T., dated 9/16/98, at 181-83). As a result of the complaints, Faulk recommended to Cheyney's Acting Vice President of Academic Affairs, Eugene Royster, that the first search for three new professors be aborted. Id. The search was then aborted. Id.

After the aborted search, Plaintiffs experienced adverse treatment from the certain faculty members and students at Cheyney.<sup>7</sup> For example, Professor Gentner was made aware of complaints from students, sent to Faulk by Dr. Jones, who stated that Gentner was making racist remarks.<sup>8</sup> (N.T., dated 9/10/98,

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<sup>7</sup> After the search was aborted, there was a departmental meeting where Plaintiffs were referred to as rats, traitors, and saboteurs and threatened with an FBI investigation. (N.T., dated 9/10/98, at pp. 182-83; N.T., dated 9/17/98, at 138-39)

<sup>8</sup> Professor Gentner received a letter from the president of the Cheyney's student government asking him to appear before a

at p. 181). In addition, Dr. Jones assigned Professor Gentner a schedule which, for the first time since 1981, included classes every weekday instead of his normal Monday, Wednesday, Friday schedule, leaving Gentner with no time to do his own research off campus. (N.T., dated 9/10/98, at 187-93). Furthermore, Gentner received a memo from Dr. Jones complaining about fifteen boxes of physics equipment that were not being utilized.<sup>9</sup> (N.T., dated 9/10/98, at 193-95). Dr. Jones also sent Gentner a letter requesting a list of all experiments that were done in his courses. Id. at 195-96.

Similarly, Dr. Stevenson received adverse treatment following the aborted search for faculty members. Dr. Stevenson received a series of memos from Dr. Jones demanding that a student's grade be changed. (N.T., dated 9/17/98, at pp. 142-44). And like Gentner, Stevenson was also required to submit a syllabus and list of experiments to Dr. Jones, despite never having done so in the past. Id. at pp. 140, 145. Later, Stevenson was accused of not doing his labs.

In the Spring of 1992, a second search was instituted for new faculty members. The interviews took place in early June

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tribunal of students to answer charges of making racist statements to Cheyney students. (N.T., dated 9/10/98, at 183).

<sup>9</sup> The memo was copied to Dr. Cade (President), Dr. Royster (Acting Vice President of Academic Affairs), and members of the union. (N.T., dated 9/10/98, at 193-94).

of 1992. The result of the second search was the selection of Mark Lafferty, a white male, as the candidate.

Following the second search, Drs. Jones and Chang submitted numerous memos to Harding Faulk and the administration, characterizing the search as manipulated and pointing out that no minority was going to be hired. (N.T., dated 9/16/98, at 190-94; see also Exs. P-4, P-12, P-78 and P-83). Even though Dr. Faulk's investigation of the letters and memos from Drs. Jones and Chang did not reveal any wrongdoing, Faulk advised the administration to abort the second search. (N.T., dated 9/16/98, at 190-94; see also P-70).

During this time, Dr. Chang complained to Dr. Faulk that she was sexually harassed and sexually assaulted by Professor Gentner. (N.T., dated 9/16/98, at 197; see also Pls.' Exs. 13 and 15). While Dr. Chang's charges were found to be unsubstantiated, an investigation occurred without the knowledge of Fred Gentner. In the fall of 1992, Chang had a mental breakdown and took a leave of absence from Cheyney. (N.T., dated 9/16/98, at 225; N.T., dated 9/18/98, at 135-36).

On or about June 20, 1992, within days after the second search was completed, a student named Jerome Dowell prepared complaints against Gentner and Stevenson alleging, among other things, ethnic and racial intimidation, academic incompetence, extreme psychological intimidation, abuse of academic freedom,

and poor teaching performance. (N.T., dated 9/16/98, at p. 151). Despite having minimal and nondiscriminatory contact with Plaintiffs, Dowell submitted these complaints to the administration, along with other derogatory materials previously submitted by Drs. Jones and Chang. (N.T., dated 9/16/98, at 149-50, 165-66). At trial, Dowell claimed that the above materials were given to him anonymously; however, Dowell testified in his deposition that Octavia Warren, President of the Biology Club, gave him the documents. (N.T., dated 9/16/98, at 158-59). Moreover, Dr. Jones was the adviser of the Biology club.

As a result of the aborted second search, Cheyney's science department was very low on faculty. In response, Dr. Jones recommended that a Dr. Edward Smith, an African American male, cover certain classes as an adjunct professor, even though Dr. Smith was not on the department's list of approved and available adjunct professors. (N.T., dated 9/15/98, at 77; N.T., dated 9/17/98, at 49-52). Dr. Smith was not on the department's list because he had not submitted his university transcripts for review by the science department. Id. As a result, the whole science department, with the exception of Drs. Jones and Chang, protested Dr. Smith's hiring. (N.T., dated 9/11/98, at 26-27).

In the Fall of 1992, Gentner and Stevenson began experiencing changes in their work environment. According to Plaintiffs, the students at Cheyney became very cold toward them,



challenged their teaching and work assignments, walked in and out in the middle of lectures, and no longer sought help or stopped in during conference hours. (N.T., dated 9/11/98, at 47-48; N.T., dated 9/17/98, at 151). Many of these same students were members of the Biology Club of which Dr. Jones had been the advisor for fifteen to sixteen years prior to the 1992 Fall term. (N.T., dated 9/15/98, at 140).

Harding Faulk<sup>10</sup> knew that many of the students from the biology club were the same students complaining about Gentner and Stevenson but never discussed this with the recently appointed Vice President of Academic Affairs, Albert Hoffman.<sup>11</sup> (N.T., dated 9/16/98, at 184-85; N.T., dated 9/17/98, at 18). In addition, Mr. Faulk knew that there were numerous allegations of racism against Dr. Eugene Jones.<sup>12</sup>

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<sup>10</sup> Faulk, in addition to being Cheyney's Director of Institutional Research and Affirmative Action, served also as the de facto special assistant to the president in the Fall of 1992. (N.T., dated 9/17/98, at 18-19).

<sup>11</sup> In the Fall of 1992, Albert Hoffman, Dean of Science and Mathematics at Millersville University, was appointed by the Chancellor of the State System of Higher Education to be part of the Loan Executive Program at Cheyney University. Because Cheyney lacked administrators, Hoffman was appointed the Vice President of Academic Affairs. (N.T., dated 9/17/98, at 24-25). He worked at Cheyney two and one-half days per week and continued to serve as dean at Millersville for the rest of the week. Id. at 27-28.

<sup>12</sup> In July of 1992 Connie Sivieri, a white secretary at Cheyney, complained to Harding Faulk that Eugene Jones said to her "things are so messed up around here, it is because of all those white people." (N.T., dated 9/15/98, at 201; Ex. P-95).

Hoffman also received complaints from Plaintiffs and other members of the science department seeking the removal of Jones as Chair and discussing the harassment by Jones and Chang with regard to the hiring procedures. And Hoffman received complaints from Jones and Chang regarding Plaintiffs. One of Hoffman's responsibilities was to look into the complaints about the hiring practices. (N.T., dated 9/17/98, at 46-47). But when Plaintiffs began to talk about their problems at a department meeting, held on October 1, 1992, Dr. Hoffman stopped the two from speaking and, rather than listen to Plaintiffs regarding their petition seeking Jones' resignation, Hoffman accused Gentner of not doing labs and Stevenson of missing classes.<sup>13</sup>

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Faulk then contacted Jones and had him apologize. Id. And in September of 1992, Professor John Robinson, an African-American member of the Science and Allied Health Department, reported to Harding Faulk that Jones stated during the second search that "as long as I am chairperson, I am not going to accept a white one." (N.T., dated 9/16/98, at 232-34). Robinson reported to Faulk that he told Jones that he was being racist. Id. Robinson further informed Faulk that Jerome Dowell, although not employed, appeared to be serving as Dr. Jones' assistant and that the two of them generated petitions during the summer of 1992 to say that Gentner and Stevenson were racist. (N.T., dated 9/16/98, at 234-35; Ex. P-94). Gentner also complained to Faulk that he heard Jones talking to Dr. Edward Smith and state the following; "we had a former Cheyney grad who was going to help us out with it but those white bastards would not let us hire him because he is black. See Faulk Ex. P-96; N.T., dated 9/16/98, at 236-37.

<sup>13</sup> Beginning in the 1980s, Gentner held open labs which consisted of taking the set two hours of lab time and using it for lectures, then having the students at their own schedule perform laboratories supervised by Professor Gentner on his own time. (N.T., dated 9/10/98, at 165-68). Up until the Fall of 1991, Prof. Gentner's chairs, including Dr. Jones, were aware of

(N.T., dated 9/11/98, at 49-51, 54; N.T., dated 9/17/98, at 61-67, 75-78, 161). Gentner changed his laboratory method pursuant to Hoffman's October 1, 1992 Order. (N.T., dated 9/11/98, at 51).

Soon after the October 1, 1992 meeting, an annual report, dated June 16, 1992, authored by Eugene Jones was distributed. (N.T., dated 9/10/98, at 65-70; N.T., dated 9/11/98, at 36-41). This annual report was addressed to Dr. Royster, Acting Vice-President of Academic Affairs. Jones' annual report names Plaintiffs as the subjects of numerous letters from students to the administration and union officials complaining about them. The report goes on to mention Dr. Chang's charges of sexual harassment and ethnic intimidation against Fred Gentner. Moreover, the report ends with a chairperson's note stating:

Perhaps, we have reached a point break where something must be done immediately for the benefit of our young students. These two professors are reigning like terror over the department only because neglects from the administration and union representatives have permitted them to continue their abnormal behavior patterns.

These same two professors other than meeting their classes in which Dr. Stevenson sometimes skips his classes, do nothing for

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and approved this lab system. Id. at 169-70. However, after receiving complaints, Hoffman was critical of this method and believed that Gentner was not teaching his laboratories. (N.T., dated 9/17/98, at 61-67).

the students and the university. Also, neither professor is following the SSHE union manual by making sure the students have weekly, mandatory laboratory experiments. These two professors have been, and are still, paid full-time pay for part-time work.

We should know that these past and current practices would not be permitted at majority universities nor at other minority universities.

In addition to the above, the annual report accuses Stevenson of being in charge of the chemical stock room and leaving dangerous chemicals disorganized and in a hazardous condition. (N.T., dated 9/17/98, at 155).

Upset over the content of Jones' annual report, Gentner went to the personnel office to review his own file and, for the first time, found letters that Dr. Jones had written to Dr. Cade including an anonymous memo from a student complaining that Gentner made racial complaints in class and another memo to Cade complaining that Gentner harassed Jones. (N.T., dated 9/11/98, at 31-34). Gentner also read Dr. Chang's complaints for the first time.<sup>14</sup> Id.

Next, on October 28, 1992, Plaintiffs met with Hoffman

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<sup>14</sup> According to Fred Tucker, the Director of Human Resources and custodian of the personnel files, the only people who have access to one's personnel file is Human Resources staff, the individual employee plus anyone in the employees' supervisory chain on request. (N.T., 9/10/98, p. 71). Plaintiffs point out that Dr. Jones had been in to review Gentner's file and it is reasonable to infer that Jones placed the hostile documents in Gentner's personnel file. Id. at 72.

to talk about their complaint. The meeting merely lasted ten minutes, with Hoffman trying to leave Cheyney to attend a Millersville soccer game. At that meeting, Hoffman told them that earlier that same day he had been with the students from the Biology Science Department and Dr. Jones, who were very insistent that Plaintiffs resign. (N.T., 9/11/98, at 79). As a result, Hoffman informed Plaintiffs that he was having them evaluated by Jones and that if there was a negative evaluation, they could be terminated. (N.T., dated 9/17/98, at 168-69). Yet, Hoffman did not take any action with regard to Plaintiffs' complaints about the hostile work environment that Jones and Chang were allegedly creating. (N.T., dated 9/17/98, at 123). Gentner and Stevenson were able to have the union change the evaluators.<sup>15</sup> (N.T., dated 9/17/98, at 174-75).

After the interim evaluations, Gentner and Stevenson met with the union and asked for a meeting with Covington and Hoffman. That meeting occurred on December 3, 1992, with union representatives, Hoffman, Covington, Gentner, and Stevenson. At the meeting, Hoffman told Plaintiffs that he was recommending their termination. (N.T., dated 9/11/98, at 85).

Realizing that they had to resign, Plaintiffs then negotiated sabbatical leave. (N.T., dated 9/11/98, at 87-90;

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<sup>15</sup> Gentner learned that he was evaluated 90 out of 100, which was a very high evaluation. (N.T., dated 9/11/98, at 84).

N.T., dated 9/17/98, at 175, 180-82).

#### **IV. ACTIVITIES PROTECTED UNDER TITLE VII**

To prove their case of retaliatory discharge under Title VII, Plaintiffs had to prove the following at trial: (1) that they engaged in a protected activity; (2) that they were constructively discharged subsequent to or contemporaneously with such activity -- that Cheyney knowingly permitted conditions of discrimination so intolerable that a reasonable person subject to them would resign; and (3) that a causal link existed between the protected activity and the discharge. Gentner, 1997 WL 529058 at \*4.

At the outset, Cheyney challenges this Court's granting of Plaintiffs' Rule 50 Motion and the jury instruction directing that Plaintiffs had engaged in a protected activity. According to Cheyney, not only did Plaintiffs fail to establish that they reasonably believed that the employment practices they challenged were unlawful, but that this Court erred when it instructed the jury that Plaintiffs were engaged in a protected activity when they spoke out against Cheyney's hiring practices.

In order to satisfy the first prong of their prima facie case, Plaintiffs Gentner and Stevenson needed only to prove that they reasonably believed that Cheyney's employment practice was unlawful or discriminatory. See Kania v. Archdiocese of Philadelphia, 14 F. Supp.2d 730, 736-37 (E.D. Pa. 1998) ("It is

well-settled that a plaintiff in a retaliatory discharge claim need only prove that, at the time she opposed it, she reasonably believed that the challenged employment practice was unlawful." ). Here, the record clearly shows that Plaintiffs did, in fact, believe that the employment practice they objected to was both illegal and discriminatory.

During their testimony, Plaintiffs stated that they thought the way in which the faculty searches had been conducted was wrong. For example, when asked why he was angry about the way in which the scoring system was changed, Professor Gentner testified as follows:

A: Well, we really needed teachers. The biology area was in sad shape, because biology today is almost totally based on molecular biology. That's the new thing. Our department didn't really have a molecular biologist, so we couldn't really develop a modern curriculum. We really needed top people, and the candidates we had were really top people. We were very lucky to get them. It was rare that we got such really good, top people applying, and I thought there was something funny going on. These are tenure track positions, and these people are going to be there forever, and this was my department where I have to work, and I wanted it to be the best department possible, and also, people get good salaries. I wanted the State to get their money's worth with the best possible teachers.

Q: And did you feel by the changing of the point system that you weren't getting the best possible teachers?

A: Well, evidently, because Dr. Siu

was not up at the top three positions.

(N.T., dated 9/10/98, at 180).

Likewise, when Dr. Stevenson was asked how he felt about how the rules of the selection process had changed "in the middle of the game," Stevenson replied as follows:

Q: And how did you feel about the changing of that vote?

A: I thought it wasn't right.

Q: Why not?

A: Well, we hadn't had faculty members for years. These were tenure track faculty members, they were going to be there a long time and I thought I was going to be there a long time. And we wanted the best people that we could get for that reason, but mainly we wanted the best people for the money that we could get. These people are on tenure track and they'll probably get tenure. And if they're not the right people if they have something less than what the standards were about them, that wasn't what we were after. We were after the best people that we could get for the money.

(N.T., dated 9/17/98, at pp. 137-38).

According to Cheyney, the evidence of record does not support this Court's finding that Plaintiffs' protests regarding the University's hiring practices stemmed from their belief that Defendant was engaging in unlawful or discriminatory activity protected under Title VII. Rather, Cheyney asserts that "[Plaintiffs] were protesting a departure from what they thought was Cheyney protocol." Def.'s Brief in Supp. of JNOV at 20.



A review of the above testimony shows, however, that Cheyney is merely splitting hairs. It is clear that both plaintiffs in this case felt that the best candidates for the vacant faculty positions were not being hired by the department and that such an employment action, in and of itself, was discriminatory. Discrimination may be defined as "treatment or distinction not based on individual merit in favor of or against a person, group, etc." The Random House College Dictionary (1973); see also Cain v. Hyatt, 734 F. Supp. 671, 682 (E.D. Pa. 1990) ("The essence of discrimination . . . is the formulation of opinions about others not on their individual merits, but on their membership in a class with assumed characteristics.'). Here, Plaintiffs believed that the candidates chosen at Cheyney were not selected based on individual merit and, thus, discrimination was present. See Sumner v. U.S. Postal Service, 899 F.2d 203, 209 (2d Cir. 1990) (Title VII's opposition clause protects formal and informal protests of discriminatory employment practices, including making complaints to management, protesting against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges).

Moreover, Plaintiffs memorialized this belief in memoranda that they submitted, upon request, to Cheyney's Vice-President of Academic Affairs, Albert Hoffman, who stated that he

supported the chairman of the department, Dr. Jones, but did ask Plaintiffs to put something in writing regarding their complaints. As a result, Plaintiffs each sent him a memo. Gentner's memo, dated, October 25, 1992, briefly reviews the above facts and concludes as follows:

I have omitted many details of this account in order to hold this letter to a reasonable length, but I believe you can perceive the pattern of the conflict between Dr. Jones and the Department Members and understand why he has chosen to lash out at us with false charges of various kinds. None of us have any such charges on our record after 25 to 30 years of service. We believe, not just from this account, but from his many other actions and statements that Dr. Jones has a racial element in his motivation to illegally control the hiring process. That, if left to his devices, the University would face charges of violating the equal opportunity laws of the state and the federal government. I personally also believe that he is working as hard as possible to remove white professors from our Department.

Ex. P-70. The content of the memo shows Plaintiffs' good faith belief that they were protesting what they considered to be a discriminatory employment practice by Cheyney University.<sup>16</sup> See Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1085 (3d Cir. 1996) ("[P]rotesting what an employee believes in good faith to be a discriminatory practice is clearly protected conduct.").

Accordingly, this Court granted Plaintiffs' Rule 50 Motion with respect to the first prong of the standard in this

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<sup>16</sup> Prof. Stevenson gave Hoffman similar memoranda.

case -- that Plaintiffs engaged in a protected activity.

Subsequently, this Court instructed the jury as follows:

There are three principal elements which the Plaintiffs must prove in order to prevail on their claim. The first, each plaintiff must prove that he engaged in protected activity. He must prove that he protested activity which he reasonably believed to be unlawful under Title 7.

And what we're talking about is that original protest about the searches and the manner in which the hiring process was being gone about. That was the exercise of the First Amendment rights.

And I instruct you that in doing that, in making that protest, the Plaintiffs were engaged in a protected activity when they spoke out against the hiring practices. Okay? That is element number one.

And I have instructed you that that was a protected activity.

(N.T., dated 9/23/98, at 11).

Counsel for Cheyney preserved the defendant's objection regarding the above instruction: "[w]e also object for the record to the instruction that the Plaintiffs engaged in protected activity and spoke out and we've said -- we believe that it's not a Title 7 violation but perhaps a First Amendment violation which is different." (N.T., 9/23/98, at 26). For the reasons already discussed above, this Court finds that Plaintiffs did engage in a protected activity under Title VII.

In its post-trial brief, however, Cheyney adds that this Court's jury instruction misled the jury into believing that Plaintiffs need only show that they were exercising their First

Amendment rights -- and hence that no demonstration of race discrimination was required. As a result, Cheyney contends that the above instruction was misleading, confusing and prejudicial, and, thus, militates in favor of a new trial.

However, a review of the above jury instruction merely reveals that the jury was informed that Cheyney's employment practices encroached on two independent rights of Plaintiffs.<sup>17</sup>

Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1576 (5th Cir. 1989) (recognizing that unlawful employment practices may encroach on rights created by Title VII and § 1983), cert. denied 493 U.S. 1019 (1990); see also Rutan v. Republican Party of Illinois, 497 U.S. 62, 76 n.8 (1990)

(discussing overlap between First Amendment and Title VII).

Supplying the jury with the knowledge that Plaintiffs, in speaking out against Cheyney's hiring practices, not only engaged in a protected activity for Title VII purposes, but exercised their First Amendment rights cannot serve as a sufficient basis for a new trial.

While Cheyney contends that this Court's instruction resulted in a misunderstanding by the jury that Plaintiffs were not required to produce evidence of race discrimination, such a position is belied by this Court's very next instruction

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<sup>17</sup> The violation of Plaintiffs' First Amendment rights to speak out against Cheyney's hiring practices was a major part Plaintiffs' § 1983 claim.

regarding the second element of Plaintiffs' prima facie case: "Second, plaintiffs must prove that they were constructively discharged subsequent to or contemporaneously with the protected activity. That is that Cheyney knowingly permitted conditions of discrimination so severe or pervasive that a reasonable person subjected to them would foreseeably resign." (N.T., dated 9/23/98, at 11). The jury was given the task of determining whether Plaintiffs provided enough evidence to satisfy the second element of their claim, which, as instructed by this Court, required consideration of whether or not intolerable conditions of discrimination were present. Thus, this Court finds that Cheyney's concern over the above jury instruction is unfounded.

**V. EVIDENCE OF CONSTRUCTIVE DISCHARGE**

Cheyney likewise argues that Plaintiffs did not supply any evidence to support a finding that they were constructively discharged in retaliation for any protected activity. More specifically, Cheyney asserts that Plaintiffs did not provide sufficient evidence to show that "conditions of discrimination" existed at Cheyney. According to Cheyney, none of the allegedly discriminatory acts described at trial constituted employment actions for purposes of Cheyney's liability. Cheyney further argues that none of the events, either individually or viewed collectively, are legally sufficient for a finding of a racially hostile work environment.

The Third Circuit, as well as other courts of appeals, has held that "`acts of discrimination in violation of Title VII can make working conditions so intolerable that a reasonable employee would be forced to resign,' . . . and therefore entitle the employee to damages for wrongful termination in addition to damages for the pretermination discrimination." Levendos v. Stern Entertainment, Inc., 860 F.2d 1227, 1230 (3d Cir. 1988) (citations omitted). Courts generally agree that "constructive discharge" is a heavily fact-driven determination. Id. However, "no finding of specific intent on the part of the employer to bring about a discharge is required for the application of the constructive discharge doctrine." Goss, 747 F.2d at 888. Instead, the focus of this Court's analysis must be the impact of Cheyney's actions, whether deliberate or not, upon Gentner and Stevenson. Levendos, 860 F.2d at 1230.

Applying the objective, reasonable person test of which the Third Circuit has adopted, this Court finds that a jury could reasonably conclude that the incidents experienced by Plaintiffs in this case were racially motivated and that conditions of discrimination existed at Cheyney that were so intolerable that Plaintiffs had no real choice but to resign. In this regard, Plaintiffs set forth the following supporting evidence at trial:

- 1) Gentner's longstanding schedule being changed which made it impossible for him to continue his research with the Defense Department (N.T., dated 9/10/98, at 186-93);

2) Various derogatory memos being sent by Jones to the administration, union, students and staff about both plaintiffs and the hiring practices of the department (N.T., dated 9/10/98, at 40-45; N.T., dated 9/11/98, at 31-32; N.T., dated 9/17/98, at 100-101);

3) Stevenson being threatened with a lawsuit and forced to change a student's grade despite his academic freedom (N.T., dated 9/17/98, at 142-44);

4) Chang filing false claims of racial and sexual harassment and intimidation against Gentner (N.T., dated 9/10/98, at 58-63);

5) Hoffman and Faulk ordering two re-investigations into Chang's harassment charges when the first investigation determined that her charges were unfounded (N.T., dated 9/10/98, at 60-62; N.T., dated 9/16/98, at 208-16; N.T., dated 9/17/98, at 115-21);

6) Jones and Jerome Dowell generating petitions to say that plaintiffs are racists and sending these petitions out into the university community (N.T., dated 9/16/98, at 151);

7) Students protesting and making complaints about Gentner and Stevenson, questioning Plaintiffs' teaching methods, and being hostile, uncooperative, and disruptive in Plaintiffs' classes (N.T., dated 9/11/98, at 47-48; N.T., dated 9/17/98, at 18-22, 151, 171);

8) Jones issuing an annual report that was distributed to the university community which accused Plaintiffs of engaging in unprofessional, uncaring, and racist behavior (N.T., dated 9/11/98, at 36-41; N.T., dated 9/10/98, at 65-70);

9) Hoffman and Faulk failing to take any remedial action, despite complaints from Plaintiffs, Sivieri, Robinson, and the entire Science and Allied Health Department (except Chan) that Jones was racist (N.T., dated 9/16/98, at 229-42; N.T., dated 9/17/98, at 123);

10) Faulk aborting the second search at Jones' request despite no signs of manipulation (N.T., dated 9/16/98, at 190, 202-03);

11) Royster referring to Plaintiffs as "rats and traitors" for objecting to the first faculty search (N.T., dated 9/10/98, at 182-83; N.T., dated 9/17/98, at 138-39);

12) Hoffman ignoring Plaintiffs' complaints of racism, repeatedly threatening their jobs, and ordering the punitive interim evaluations against Plaintiffs (N.T., dated 9/17/98, at 101-23); and

13) Covington, who was informed of the Plaintiffs' complaints, fearing that there would be violence on campus against Plaintiffs (N.T., dated 9/17/98, at 81-84).

Thus, there was considerable evidence presented at trial from which a reasonable jury could conclude that Plaintiffs experienced conditions of employment so intolerable that a reasonable person would resign. Goss, 747 F.2d at 888 ("The court need merely find that the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign.").

Prof. Gentner summarized his reasons for leaving Cheyney as follows:

Q: When you heard this, sir, did you tell him that, "Hey, I'm a tenured professor. You can't do this to me?"

A: At that time I was not in the mood to say that. At that time I was just crushed. See, this whole idea that I'm a tenured professor -- I've been there for many years, and as such it would be very difficult to dismiss me. I knew that.

But think of what I had to go through if I stayed there: constant investigations about false allegations, constant harassment, students not learning. I'm not being able to do my job, my professional job. My reputation is being torn to shreds. I was thinking, you know, I wouldn't even be able to get another job in another school. Okay, maybe I can stay on here. Maybe there is even going to be physical violence. I don't know what's going to happen next. What will



Dr. Jones do next? What will Dr. Chang do next to me? And no one was stopping them. No one was controlling them. No one was listening to me.

The administrators wanted me out of there. I felt that I had to get out of there. So it wasn't a question of, well, were the evaluations good or bad. Well, you're a tenured professor. You don't have to worry about anything.

My physical health had deteriorated by this time. I had tightness in my chest. I had constant headaches. My blood pressure was very high. I couldn't sleep. I was having trouble eating. It was hard for me to do my work, because half my time was made up of writing memos to people, answering charges, and going to meetings and being screamed at and told to resign. I just had had it. I couldn't do it anymore.

Q: Had any of those conditions ever existed prior to you speaking out against the searches that began in 1991?

A: No, sir.

Q: How about your teaching? Was your teaching ever affected by all this going on?

A: Well, naturally the teaching was affected, because the students weren't coming to class, or when they came to class they didn't do anything. They weren't responsive. I mean, I was teaching, but there wasn't much going on.

Q: How did you feel as a teacher?

A: Well, I am a teacher. I mean, if someone asked me, "Who are you?" "I'm a teacher." I thought -- I was teaching for all my adult life. I started teaching when I was 22.

This was not teaching anymore. What I want to do is teach. I mean, my profession was ruined and my reputation was ruined. After all those years my reputation as a

teacher was being destroyed.

Even if all the allegations were proved to be false, people are going to wonder about me because they were made at all. So I go apply somewhere for a job, "Oh, you're the guy that harasses women and is a racist."

"Oh, but I proved that that was false."

"Oh, yeah, I bet you did." I felt it was the end of my career, that that day was the last day I would ever work.

Q: When Dr. Hoffman made those comments, can you tell me what you did? I mean, you told us how you felt. Tell us sequentially what happened after that.

A: What happened after that, of course, Dr. Stevenson was, you know, very much upset as well, in my estimation, and I said to him, "Bob, let's go out in the hallway." I wanted to talk privately.

We went out in the hallway. We cried on each other's shoulder. We were both trembling. We were physically trembling. We talked about it and talked about it, and we both came to the same conclusion.

There is no way in the world we can stay here. No matter what the conditions they give us are, whatever evaluation means or whatever tenure means, all of those things were technicalities. We couldn't physically stay on this campus and be teachers.

So we decided to resign, and then we went back and talked to Dr. Hoffman about it.

Q: Did you feel your resignation was voluntary?

A: It certainly wasn't. We were forced into resigning.

(N.T., dated 9/11/98, at 87-90).

Similarly, Professor Stevenson testified about the circumstances that led to his decision to resign:

Q: Why don't you tell us what

pressures you were feeling teaching in the fall or late fall of '92?

A: Well, my students didn't want to listen to me. I was getting no response to what -- to my complaints to Dr. Hoffman and others. I felt like I was pretty isolated with this. Dr. Jones had called for my resignation or termination not once, but a couple of times, the annual report and the other time. Dr. Jones had nothing positive to say about me that semester. If he said anything it was negative and often it was without copies to me. I had asked for copies of my memos in the end of November, I did not get them, I got no answers. It was hard teaching my students, my health was failing.

(N.T., dated 9/17/98, at 175).

\* \* \* \*

A: We discussed whether we could stay or not, you know, could we do it? And we very sadly came to a conclusion that our careers were at an end.

Q: Why did you come to that conclusion?

A: There was no one there supporting us. The students were against us and Dr. Hoffman had sided with Dr. Jones again with -- with Dr. Jones and the students against us. We had no -- and we had health that was getting bad and under those circumstances could only get worse. The possible potential violence I never hoped to see that happen, but it didn't look like we'd be able to teach these people and our career was teaching.

\* \* \* \*

Q: Did you feel that your resignation was voluntary?

A: No.

Q: Why not?

A: I was put in such a situation that I couldn't teach there anymore. How do you teach students that don't trust you, that have been turned against you? Jones was against me. He saw Chang was attacking me. She was -- although she was on sick leave she was back and forth in the building. I saw her one evening with her husband when I was working there. They -- it was a hostile atmosphere, I couldn't take it.

(N.T., dated 9/17/98, at 180-82). As shown above, there was sufficient evidence from which a jury could reasonably find that Plaintiffs were constructively discharged.

**VI. WHETHER DR. JONES IS A SUPERVISOR UNDER TITLE VII**

Next, Cheyney argues that it cannot be held vicariously liable for Dr. Jones' actions because he could not be considered a supervisor for purposes of Title VII liability.

The Third Circuit has adopted the following test to determine whether someone is an agent whose actions may be imputed to the employer for Title VII purposes: "A person is an agent under § 2000e(b) if he participated in the decision-making process that forms the basis of the discrimination." Levendos v. Stern Entertainment, Inc., 909 F.2d 747, 752 (3d Cir. 1990). More recently, the United States Supreme Court has stated that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." Burlington Industries, Inc. v. Ellerth, \_\_\_ U.S.

\_\_\_, 118 S. Ct. 2257, 2270 (1998).

In support of its argument that Dr. Jones was not a supervisor of Plaintiffs, Cheyney argues that Jones possessed no authority over Plaintiffs, nor could Plaintiffs reasonably have believed that he held any such authority.<sup>18</sup> In this regard, Cheyney asserts that, pursuant to the Collective Bargaining Agreement between the State System of Higher Education ("SSHE") and the Association of Pennsylvania State College and University Faculties, Dr. Jones could only recommend personnel actions subject to removal from office by the President. Def.'s Brief at 30. Cheyney further argues that the testimony at trial by Mr. Hegamin, Mr. Tucker, and Dr. Jones supports a finding that Jones had no power to make anything more than a scheduling recommendation. Thus, Cheyney contends that Dr. Jones had no power to discipline Plaintiffs. Def.'s Brief at pp. 30-39.

A review of the evidence, however, shows that a reasonable juror could find that Dr. Jones was Plaintiffs' supervisor or acted with such authority toward Plaintiffs. Jones, as the Science Department Chairman, had the ability to hire with the approval of his department and the

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<sup>18</sup> "As a general rule, apparent authority is relevant where the agent purports to exercise a power which he or she does not have, as distinct from where the agent threatens to misuse actual power." Ellerth, 118 S. Ct. at 2267-68.

administration.<sup>19</sup> In addition, Dr. Jones, as the department chair, independently reviewed and interviewed potential hires. (See CBA Ex. "1"). And while Dr. Jones could not fire without approval of the administration, he was the prime evaluator of Plaintiffs.<sup>20</sup> And as an evaluator of Plaintiffs, Dr. Jones, as Chair of the Allied Health and Science department, was able to convince Hoffman that Plaintiffs conducted themselves in an unprofessional manner. See, Jones Annual Report (Pls.' Ex. 29); see also Memo from Jones to Gentner, dated 11/11/92, charging Gentner with insubordination (P-149).

Furthermore, Fred Tucker, Cheyney's Director of Human Resources, considered the department heads to be the only continuous position of a supervisory nature at Cheyney. (N.T., dated 9/10/98, at 33). Tucker likened the duties of a chairman to that of "first-line supervisor." Id. at 86. More

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<sup>19</sup> It is worth noting that Dr. Jones actually hired Dr. Ed Smith without any approval. (N.T., 9/15/98, at 77; N.T., 9/17/98, at 49-52). When confronted with this unapproved hiring, the record shows that the emergency hiring power exhibited by Dr. Jones, although challenged by the rest of the science department, was not overturned. (N.T., dated 9/11/98, at 23-27).

<sup>20</sup> In this regard, a former chairman of Plaintiffs' department at Cheyney, Prof. John Stollar, testified that, while he taught at Cheyney from 1976 to 1985, evaluating faculty was a part of his duties as chairman of the department and would still be part of the duties of the chairman of a department at Cheyney University. (N.T., dated 9/15/98, at 209, 211-12). Moreover, as chair, Stollar further testified that he was able to affect the ability of a tenured faculty member to be promoted and was able to affect the termination of a tenured faculty member. Id. at 212-13.

specifically, Tucker testified that, as head of the department, the supervisory duties of department chairs consisted of doing all of the things that are required to run an academic department prior to forwarding them to the administration for approval and implementation, such as administering the meetings, setting up departmental committees, overseeing the committees, and gathering up and creating class schedules. Id.

A survey of the case law in this area provides a basis for a jury to reasonably find that, based on the above facts, Dr. Jones was a supervisor for purposes of binding Cheyney under respondeat superior liability. See Durham Life Ins. Co. v. Evans, 166 F.3d 139, 154-55 (3d Cir. 1999) ("In general, complete authority to act on the employer's behalf without the agreement of others is not necessary to meet Title VII's agency standard of supervisor liability."); Bonenberger v. Plymouth Township, 132 F.3d 20, 23 (3d Cir. 1997) ("A state employee may, under certain circumstances, wield considerable control over a subordinate whose work he regularly supervises, even if he does not hire, fire, or issue regular evaluations of her work."); see also Levendos, 909 F.2d at 752 (person is agent under § 2000e(b) if he participated in the decision-making process that forms the basis of the discrimination); Hamilton v. Rodgers, 791 F.2d 439, 442-43 (5th Cir. 1986) (same); Verde v. City of Philadelphia, 862 F. Supp. 1329, 1334-35 (E.D. Pa. 1994) (same).

Based on the above, this Court issued its charge on respondeat superior liability and the issue of Dr. Jones' supervisory status as follows:

Is Cheyney University responsible for Dr. Jones's actions? Is it responsible for Dr. Chang's actions?

A dispute exists as to Dr. Jones. He was the chairman of the department in which the two Plaintiffs were employed and there is a dispute as to whether or not he was a supervisor[] as to Professor Gentner and Dr. Stevenson.

If you find that Dr. Jones was a supervisor as to those two Plaintiffs, then Cheyney University would be responsible for his actions.

In order to determine whether Dr. Jones was a supervisor of Cheyney University -- of these individuals, it is necessary for you to determine what his status was and that is your decision. you must make that determination. Was he their supervisor?

In doing that, you may take into consideration whether Dr. Jones had immediate authority over the Plaintiffs as their department chairman, whether Dr. Jones had direct ability to influence hiring and firing decisions, whether Dr. Jones had authority to influence Plaintiffs' work schedules, whether Dr. Jones could evaluate Plaintiffs. Also, you should consider whether Dr. Jones was the Plaintiffs' -- whether he could effect a significant change in their employment status such as firing, hiring, failing to promote, a reassignment with significant different -- significantly different responsibilities.

Those are some of the factors that you should consider. In making that consideration, think of the chain of command that we have heard about and you should consider whether or not who was above Dr. Jones, who did he report to. You may consider the fact that we've heard testimony that there was no dean at this time over this department. That was vacant.



Those are some of the factors that you should consider in making your determination whether or not Dr. Jones held a supervisory capacity -- position as to Plaintiffs, Professor Gentner and Dr. Stevenson.

If you find that Dr. Jones was Plaintiffs' supervisor, you may hold Defendant, Cheyney University, responsible for his actions under Title 7, if you determine that Dr. Jones's actions have violated Title 7.

If you find that he was not a supervisor, then Cheyney would be responsible for his action only if higher officials at Cheyney knew or reasonably should have known about any unlawful conduct and failed to take prompt, effective action to stop it.

(N.T., 9/23/98, pp. 15-16).

Defendant's counsel preserved the objection regarding this instruction as follows: "Last, your Honor, with respect to the instruction regarding Dr. Jones, I believe the Court instructed among other things that the ability to influence a working schedule is a -- could be construed as a supervisory activity and I believe the case law is that -- that that is not an element that would be used to determine supervisory liability under Title 7." N.T., dated 9/23/98, at 27.

However, the Third Circuit has held that "[i]f an employer's act substantially decreases an employee's earning potential and causes significant disruption in his or her working conditions, a tangible adverse employment action may be found." Durham, 166 F.3d at 153. In this regard, Prof. Gentner testified that Dr. Jones' altered his schedule by giving him two Natural

Science courses to teach. Consequently, Gentner testified that he could no longer continue his research work for the Defense Department that he had been doing for the past 12 years:

Q: The [exhibit] marked 129 is a memo from who to who?

A: It's to Eugene Jones, chairman of Science and Allied Health Department, from Fred Gentner, associate professor of physics.

Q: And what was the purpose of this memo?

A: This memo was to remind him of my research activities and to ask him for the Monday, Wednesday, Friday schedule.

Q: And can you just paraphrase what you indicated in this memo?

A: Well, the memo says, "I've spent the last 12 summers doing research with the Defense Department. The research involves design of novel sensor elements for using radioactive instrumentation for purposes of tactical nuclear battle field monitoring." That's the kind of research that I do. In order to continue this work, I'll be using Tuesdays and Thursdays. It is, therefore, necessary to continue my Monday, Wednesday, Friday schedule.

"Since this research has augmented the reputation of our department and improved our accreditation profile, it would be important to the University to continue it. Thank you," etcetera.

Q: What about 130? Who is that addressed to, Exhibit 130?

A: Well, after I didn't get any response from Dr. Jones -- and I also talked to him, of course, personally. I mean, the memo came after I talked to him personally about it.

I sent a memo to Dr. Royster in the hopes that he might change Dr. Jones' mind, and this is a rather long memo, but it describes the research that I was doing in more detail and some papers I delivered in Texas and things of that sort, and I asked him -- I mentioned that I never requested either release time or University funding. I did it all on my own, and I think it would help the University if they would continue giving me that schedule to allow me to do the research.

Q: And did you get a response from either Dr. Jones or Dr. Royster concerning this schedule?

A: The response I got was from Dr. Royster, that he backed up Dr. Jones, and he would not change it.

Q: Did you go along with it?

A: Well, I had to. I mean, I'm an employee, and employees have to do things.

Q: And the schedule that you ultimately ended up with in the fall of 1992, who gave you that schedule?

A: Dr. Jones.

(N.T., dated 9/10/98, at 191-93).

Here, Gentner's testimony confirms that a change in his work schedule did interfere with his research with the Defense Department and, thus, significantly impacted his earnings and working conditions.<sup>21</sup> In light of the circumstances surrounding

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<sup>21</sup> Gentner worked in the Nuclear, Biological and Chemical Warfare Division of the Defense Department as a consultant. His research was encouraged by Cheyney and benefited the University. (N.T., dated 9/10/98, at 160-62).

the faculty search, a reasonable jury could interpret the change in Prof. Gentner's schedule "as part of a complex tapestry of discrimination." Aman, 85 F.3d at 1083. As a result, this Court properly instructed the jury that Dr. Jones' influence over Gentner's work schedule could be considered a factor in determining whether Dr. Jones was a supervisor for purposes of binding Cheyney under Title VII respondeat superior liability. See Faragher v. City of Boca Raton, \_\_\_ U.S. \_\_\_, 118, S. Ct. 2275, 2291 (1998) (power to supervise may include to hire and fire and to set work schedules and pay rates); see also Kimbrough v. Loma Linda Development, 183 F.3d 782, 784 (8th Cir. 1999) (finding that there was sufficient evidence for district court to submit to jury the issue of whether supervisor had authority to affect the plaintiffs' earnings and hours).

#### **VII. VICARIOUS LIABILITY UNDER TITLE VII**

As stated above, Plaintiffs in this case were required to prove, among other things, that Cheyney knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign. See Goss v. Exxon Office Systems, 747 F.2d 885, 888 (3d Cir. 1984). While Title VII liability can attach vicariously to an employer if the intolerable condition were created by one of its supervisors with immediate or successfully higher authority over the plaintiff-employee, such liability may also attach if a reasonable jury

could conclude that someone with respondeat superior authority had knowledge that a discriminatory hostile work environment was present but failed to take appropriate steps to correct the condition. Bonenberger, 132 F.3d at 26.

In this regard, the Court instructed the jury that it is undisputed that Dr. Albert Hoffman, Dr. Douglas Covington, Dr. Eugene Royster and Dr. Harding Faulk are management level or supervisory employees who have the power to bind Cheyney, and, thus, if the jury found that either of them knew or should have known that Plaintiffs were subjected to a hostile work environment as a result of speaking out against Cheyney's hiring practices, and failed to take appropriate action, then Cheyney must be held responsible for their actions. (N.T., dated 9/3/98 at 34; N.T., dated 9/23/98, at 14).

In its Supporting Memorandum, Cheyney contends that no agents of Cheyney had notice of alleged discrimination against Plaintiffs. Cheyney further argues that when Plaintiffs did put Cheyney on notice of alleged improprieties, Cheyney addressed their complaints. Def.'s Brief at 41-42. As demonstrated below, however, the evidence presented by Plaintiffs provided a sufficient basis for a reasonable jury to conclude that Cheyney knowingly permitted conditions of discrimination.

**A. ALBERT HOFFMAN**

Plaintiffs correctly point to the following evidence

that Cheyney's Vice-President of Academic Affairs, Albert Hoffman, knew that Plaintiffs believed that Drs. Jones and Chang were creating a hostile work environment in retaliation for Plaintiffs' protests about the hiring practices:

1. While at Cheyney, Hoffman had many discussions with Fred Tucker, Director of Human resources who specifically warned Hoffman of Dr. Jones' racist, retaliatory behavior. (N.T., dated 9/10/98, at 51-52);

2. Hoffman admits that Gentner and Stevenson told him that they felt Jones was racially motivated with respect to his hiring and recommendations to hire and actually asked Plaintiffs to put in writing some of the issues they discussed with him and that this was an ongoing concern of Plaintiffs in or about October of 1992. (N.T., dated 9/17/98, at 53-54);

3. Gentner and Stevenson met with Hoffman on at least four occasions and voiced the same complaints -- that Dr. Jones was harassing Plaintiffs, that this harassment was racially motivated and the result of their protest about the hiring practices. Id.;

4. Gentner and Stevenson each provided Hoffman with memos summarizing their conversations. (N.T., dated 9/11/98, at 59-75; N.T., dated 9/17/98, at 163-64; Pls.' Ex. 70);

5. Fred Tucker, Harding Faulk and William Hegamin, Grievance Officer, were having discussions with Hoffman about Gentner and Stevenson's complaints against Jones. (N.T., dated 9/17/98, at 55-56, 112-13);

6. The union leadership -- Harris and Hegamin -- told Hoffman to look into the problems concerning Jones and that he may be the source of the problem. (N.T., dated 9/17/98, at 104);

7. Hoffman was also aware that Plaintiffs were under pressure from students, the administration and alumni to resign. (N.T., dated 9/16/98, at 26-27);

8. Hoffman received a memo notifying him that all of the members of the Allied Health and Science Department, except Chang, were calling for Jones' resignation. (N.T., dated 9/17/98, at 59; Pls.' Ex. P-59);

9. Hoffman knew about the racial remarks made by Jones.

(N.T., dated 9/17/98, at 105);

10. Hoffman knew that Jones' racial views were causing divisiveness within the department and that the racial views were one of the reasons why the department was calling for Jones' resignation. Id. at 106;

11. Hoffman was present at a meeting in which Jones called for Gentner & Stevenson as "old men" to be replaced by "young blood." (N.T., dated 9/11/98, at 49-52; N.T., dated 9/17/98, at 151);

12. Hoffman knew that President Covington feared violence on campus as a result of the student protests. (N.T., dated 9/17/98, at 82-84); and

13. Hoffman admits that he never really took the complaints submitted by Plaintiffs against Dr. Jones very seriously and, thus, Hoffman did not look into those matters. (N.T., dated 9/17/98, at 123).

Thus, the record shows that Hoffman had actual notice of the following: (a) Jones and Chang's complaints about Gentner and Stevenson came on the heels of Plaintiffs' protests against Cheyney's hiring practices; (b) Jones was making racist remarks concerning whites in general and, specifically, about white professors not belonging at Cheyney; (c) Jones wanted Plaintiffs out of Cheyney; (d) Jones was encouraging students to complain about Gentner and Stevenson; (e) Plaintiffs were under severe attack by Jones and students; and (f) the President of the University feared student violence.

Despite being forewarned of the above, Hoffman still chose not to replace Jones.<sup>22</sup> (N.T., dated 9/17/98, at 59, 108).

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<sup>22</sup> Hoffman admits that his job duties included investigating Plaintiffs' allegations of racist hiring practices

Hoffman did so without looking into any of Plaintiffs' complaints in any detailed way. (N.T., dated 9/17/98, at 123). Rather than investigate Plaintiffs' complaints, Hoffman chose to criticize Plaintiffs based on accusations made by Jones, Chang, and the Cheyney students. And even though two investigations cleared Gentner of the sexual harassment, ethnic intimidation, and sexual abuse charges made by Dr. Chang, Hoffman wanted Fred Tucker to do a third investigation on the Chang matter. (N.T., dated 9/17/98, at 118-19). Finally, Hoffman ordered interim evaluations of only Gentner and Stevenson, a procedure which had never been used on tenured professors at Cheyney prior to this time.

Based on the above, a reasonable jury could find that Hoffman was not only negligent in failing to investigate in detail Plaintiffs' allegations that Jones and Chang retaliated against Gentner and Stevenson, but that he took direct action in support of the discharge of Plaintiffs.<sup>23</sup> (N.T., dated 9/23/98, at 123; N.T., dated 9/22/98, at 88). The evidence of record shows that Hoffman made efforts to force Plaintiffs' resignations because he believed Dr. Jones and the students. (N.T., dated

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and retaliation. (N.T., dated 9/17/98, at 46-47). Moreover, Hoffman was in the position to prevent further actions of retaliation.

<sup>23</sup> Fred Tucker testified that Hoffman was the only one that could actually apply pressure on Plaintiffs to resign because he was the administrator in that area that had direct contact with the faculty. (N.T., dated 9/10/98, at 145).



9/10/98, at 57-58; Ex. 68).

**B. HARDING FAULK**

With respect to Harding Faulk, Cheyney argues that Plaintiffs have not articulated a basis for a finding that his actions or inactions created a hostile work environment for purposes of Title VII vicarious liability. Def.'s Brief at 40. Plaintiffs respond by asserting that by the time they were constructively discharged, Mr. Faulk was the de facto acting special assistant to the president and, more than any other member of the administration, knew of the events within the Science and Allied Health Department but failed to take appropriate action. (N.T., dated 9/17/98, at 15-19).

In support of their position, Plaintiffs state the following regarding Mr. Faulk:

1. Faulk was presented with the original complaints of Plaintiffs regarding the first search (N.T., dated 9/16/98, at 181);

2. Shortly after the first search was aborted, Dr. Jones showed up with a series of student complaints against Gentner and Stevenson (N.T., dated 9/16/98, at 184-85);

3. Shortly after the first search was aborted, Dr. Chang presented her sexual and racial complaints against Gentner (N.T., dated 9/16/98, at 197);

4. Faulk was told by Gentner, Stevenson, Mr. Robinson, and Dr. Jones, himself, of Jones' intention to hire a minority faculty member at any expense (N.T., dated 9/16/98, at 189);

5. Faulk was informed that Jones was attempting to get rid of Gentner and Stevenson. (Pl.'s Ex. P-70);

6. Faulk was informed by Connie Sivieri that Gentner and

the members of the Science and Allied Health Department that Jones was expressing racist views and making racist comments (N.T., dated 9/16/98, at 229-32);

7. Prof. John Robinson, an African American member of the department, specifically met with Faulk to complain about Jones' racist manipulation of the department's affairs. (N.T., dated 9/16/98, at 233-37; Pl.'s Exs. P-94, P-95, and P-96).

Plaintiffs correctly state that, despite the above, Faulk continuously conducted investigations into the activities of Gentner and Stevenson but failed to take any action against Jones, did not advise Hoffman to investigate Jones, reopened Chang's investigation against Gentner, and did not present the other administrators with an accurate picture of events within the Science Department. Thus, there was sufficient evidence for the jury in this case to conclude that Harding Faulk, as a direct supervisor with authority to act on the situation, was negligent through his actions or inactions, which, in effect, substantially contributed to Gentner and Stevenson's resignation.

**C. EUGENE ROYSTER**

Plaintiffs further argue that Acting Vice President Eugene Royster's actions or inactions are sufficient to bind Cheyney under Title VII. Plaintiffs outline the following with regard to Royster's conduct: (1) Royster conducted a meeting following the first faculty search where he referred to Gentner and Stevenson as rats and traitors for complaining about that first search which resulted in it being aborted (N.T., dated 9/10/98, at 182-83; N.T., dated 9/17/98, at 138-39); (2) Royster

approved of Jones' decision to reschedule Gentner's classes (N.T., dated 9/10/98, at 192-93); (3) Royster was copied on almost every exhibit authored by Jones, including Jones' annual report (N.T., dated 9/22/98, at 5-6, 20-22); and (4) Royster, in his meeting with Gentner regarding Cheyney's student government complaints about Gentner's alleged racist behavior, acknowledged that Dr. Jones really thinks there are too many white males in the science department. (N.T., dated 9/10/98, at 186). Based on the above, a reasonable jury could conclude from such evidence that Royster disapproved of Plaintiffs' complaints about the hiring practices, knew Jones was retaliating against Plaintiffs, was aware of Jones' racially discriminatory views, and supported Dr. Jones' harassment.

**D. DOUGLAS COVINGTON**

As for President Douglas Covington, Plaintiffs contend that, although he did not testify, much of the correspondence and exhibits in this matter were sent to Covington. In this regard, Fred Tucker, Director of Human Resources testified that he kept Dr. Covington informed of the situation regarding Plaintiffs:

Q: Okay. Prior to learning of their resignations, did you ever communicate your concerns concerning Dr. Jones to Dr. Covington?

A: Yes.

Q: Can you tell us what you communicated to Dr. Covington?

A: Prior to this agreement and after the meeting that Dr. Covington and Dr. Hoffman and myself, the department, and Dr. Jones attended, I had a couple conversations with Dr. Covington. I tended to try to keep him abreast of potential, you know unniceties that were going to happen on campus or might be coming about, and I had a couple discussions with him about Science and Allied Health because it had gotten so nasty.

I made him aware of the fact that the complaints had gone from basically name-calling to becoming possible, potential, disciplinary actions based on poor performance by the faculty members and that I was concerned because there were a lot of racial overtones to this argument.

Q: And what was Dr. Covington's response?

A: Basically, "Thank you very much."

Q: Any other conversations other than what you've just told us?

A: Not prior to the agreement, no. We talked. I'm sure I just reiterated the same things. He would ask me periodically had anything changed, and I would say, "As far as I know, nothing has."

(N.T., 9/10/98, at 74-75).

William Hegamin, a counselor at Cheyney in 1991 and 1992 who now serves as the department chairperson of guidance and counseling at the University, also testified that, in his Union role as vice-president and grievance chairperson, he and President Covington had conversations regarding Plaintiffs' situation which alerted the President to certain facts:

A: . . . After that meeting, I talked to Dr. Covington about what the meeting was

about. And when he told me what was going on, then I explained to him that we -- that whatever the students may or may not have been saying, we had some other problems over there in the science department with Professor Gentner, Stevenson and the chairperson, that there was also some problems that other members of the department were having with Dr. Jones. I explained to him, I'm not sure in how much detail, about the hiring issues that were going on there, about issues of discrimination, and about the incident with the students as a result of that meeting that he was having. At that point in time he said that he was going to look into the matter, he was aware of it; he was aware of letters that students had, some other complaints that were being made, and that -- you know, to give him a chance to look into this thing.

\* \* \* \*

Q: Okay. And I just want to know what specifically -- you've told us generally, but I'm trying to get more specifically as to what you exactly communicated to Dr. Covington.

A: And I'm not sure, you know, we would be gone back six years, that I talked about each individual situation that was going on with Smith, I may have mentioned Smith. But more so with the hiring practices of what Professor Gentner was telling me was going on, more so than what I specifically knew, and that it ought to be something that's looked into because if in fact there was some discrimination in hiring practices the university -- or to look into that and make sure that wasn't going on.

Q: Okay. And you asked him to do that?

A: Yes.

Q: Did you tell him that professors

were thinking of filing a grievance?

A: Yeah, I told him that things had gotten to the point that Professor Gentner and Professor Stevenson had seen the -- that we had potential -- had a potential grievance that we may file. I believe at that point -- or I know at that point that Gentner, Stevenson and myself had sat down and talked about whether or not this was an issue that should go to Human Relations for Discrimination or whether or not this ought to be an issue which we would go to the papers, the daily local newspapers, if things kept escalating within that department as they said they were going on. So, I explained that to Dr. Covington and told him that I did think -- Dr. Covington was the new president, didn't want any problems, didn't know too much about the university, but at least in my mind's eye, from what I knew from our university -- and I say our because he was new and I had been there long enough to know what can happen when these situations go on -- that we didn't need to have anything go into the papers about the university.

(N.T., 9/15/98, at 248-52).

Based on the above, this Court concludes that Cheyney's contention that there was no evidence that management-level employees of the University in a position to take appropriate action had actual or constructive knowledge about the existence of a hostile work environment and failed to take prompt and remedial action is incorrect.

**VIII. CAUSAL LINK BETWEEN PROTECTED ACTIVITY AND  
ADVERSE EMPLOYMENT ACTIONS**

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Cheyney also argues that there was no legally

sufficient evidentiary basis for a reasonable jury to find that a causal link existed between any allegedly protected activity and any adverse employment action. Def.'s Brief at 43-46.

The causal connection between the protected activity and the adverse employment action can be established indirectly with circumstantial evidence, for example by showing that the protected activity was followed by discriminatory treatment or through evidence of disparate treatment of employees who engaged in similar conduct or directly through evidence of retaliatory animus. Title VII is violated if a retaliatory motive played a part in the adverse employment actions even if it was not the sole cause, and if the employer was motivated by retaliatory animus, Title VII is violated even if there were objectively valid grounds for the discharge.

Sumner, 899 F.2d at 209 (citations omitted).

In Kachmar v. Sungard Data Systems, 109 F.3d 173 (3d Cir. 1997), the plaintiff, who formerly occupied an in-house counsel position with the defendant, filed a Title VII retaliatory discharge action based on claims that she was illegally terminated in retaliation for her exercise of protected rights under Title VII, and that SunGard engaged in a pattern and practice of sex discrimination. Kachmar's protected activity consisted of complaining about under-compensation as a result of SunGard's internal practices and procedures and advising SunGard to give a bonus to a female sales rep of one of SunGard's subsidiaries over the opposition of the employee's male managers. Id. at 175-76. In reversing this Court's granting of summary

judgment in favor of defendant, the Third Circuit held, among other things, that the plaintiff alleged enough direct evidence of a retaliatory animus on the part of her immediate supervisor that, if proven, would present direct evidence of his retaliatory motives because they would permit a fact finder to infer that Kachmar was being taken off the management track because of her opposition to the manner in which SunGard was treating her and other women in the organization, and that her final dismissal was just a matter of time. Id. at 178-79.

In the case at hand, there is no question that Plaintiffs provided enough evidence of retaliatory animus on the part of Drs. Jones and Chang for the jury to reasonably infer that Gentner and Stevenson were being discriminated against because they objected to the manner in which the faculty searches were being conducted. Indeed, the record, as already described above, is replete with examples of tangible, adverse employment actions that a reasonable jury could interpret as taken against Plaintiffs in retaliation for their speaking out against Cheyney's hiring practices.

#### **IX. EVIDENTIARY RULINGS**

Defendant also challenges numerous evidentiary rulings made by this Court which, according to Cheyney, fostered an atmosphere of prejudice and passion. Def.'s Brief at 54. Plaintiffs counter by arguing that the testimony challenged by



Defendant as erroneously admitted into evidence by this Court does not consist of stray remarks, but, instead, are part of a larger picture of the work environment at Cheyney University. Pls.' Opp'n Brief at 96-97 (citing Andrews v. City of Philadelphia, 895 F.2d 1469, 1484 (3d Cir. 1990) ("A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario . . . .").

Each of the evidentiary issues raised by Cheyney will be addressed below.

**A. EVIDENCE OF ALLEGED AGE DISCRIMINATION**

Cheyney contends that its motion in limine to preclude any age-based discriminatory references, argued before this Court on September 3, 1998, should have been granted. (N.T., dated 9/3/98, at 19-28). The specific testimony that Cheyney sought to preclude were comments made by Dr. Jones' at a meeting with Plaintiffs, other members of Cheyney's science department and Drs. Hoffman and Covington, which characterized Plaintiffs as old men who should be replaced by young blood. (N.T., dated 9/11/98, at 51-52; N.T., dated 9/17/98, at 151-52). According to Cheyney, this Court permitted testimony concerning unrelated allegations of age discrimination.

Evidence, even if relevant, may be excluded if its

probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. FED. R. EVID. 403. The Third Circuit has discussed Rule 403 and the standards for determining whether or not to exclude evidence under this rule as follows:

[E]vidence may be excluded when its admission would lead to litigation of collateral issues, thereby creating a side issue which might distract the jury from the main issues. . . . Evidence should be excluded under Rule 403 only sparingly since the evidence excluded is concededly probative. The balance under the rule should be struck in favor of admissibility. Finally, we note that in determining the probative value of evidence under Rule 403, 'we must consider not only the extent to which it tends to demonstrate the proposition which it has been admitted to prove, but also the extent to which that proposition was directly at issue in the case.'

Spain v. Gallegos, 26 F.3d 439, 453 (3d Cir. 1994) (quoting Blancha v. Raymark Indus., 972 F.2d 507, 514 (3d Cir. 1992)).

In this regard, Plaintiffs correctly point out that "[t]his case is about the resignation of two white professors at a predominantly black university." Pls.' Brief at 102. While the testimony on its face comments on the age of Plaintiffs, it also is evidence of Jones' demeanor toward Plaintiffs. Moreover, as Plaintiffs set forth in their memorandum, "[i]t is also direct evidence of notice to administrators and supervisors, President Covington, and Dr. Hoffman of Dr. Jones' desire to have Plaintiffs removed from Cheyney University." Pls.' Opp'n Brief

at 103.

**B. EVIDENCE FROM CONNIE SIVIERI**

Next, Cheyney argues that this Court erred in allowing testimony of Ms. Connie Sivieri regarding discriminatory comments made to her over the phone by Dr. Eugene Jones. (N.T., dated 9/3/98, at 32-42). More specifically, it was brought out at trial that Dr. Jones had stated the following to Ms. Sivieri: "I know what's wrong with this place, too many white people around here." Cheyney argued pretrial that such a statement was irrelevant to this case because Jones was not a supervisor and that such a comment constitutes a stray remark of a non-decision maker.

First, whether Jones was a supervisor for Title VII purposes was an issue that this Court submitted to the jury for its determination. Second, evidence of other acts of discrimination is extremely probative as to whether the harassment at issue was racially discriminatory and whether Cheyney knew or should have known that reverse discrimination was occurring at the University. Cf. Hurley v. Atlantic City Police Dept., 174 F.3d 95, 111 (3d Cir. 1999) ("Evidence of other acts of harassment is extremely probative as to whether the harassment was sexually discriminatory and whether the ACPD knew or should have known that sexual harassment was occurring despite the formal existence of an anti-harassment policy."), petition for

cert. filed, 68 USLW 3164 (Sept. 8, 1999) (No. 99-431). In any event, "[the Third Circuit has] held that discriminatory comments by nondecisionmakers, or statements temporally remote from the decision at issue, may properly be used to build a circumstantial case of discrimination." Abrams v. Ligtolier, Inc., 50 F.3d 1204, 1215 (3d Cir. 1995) (citing Roebuck v. Drexel University, 852 F.2d 715, 733 (3d Cir. 1988)).

**C. ANONYMOUS ACTS OF VANDALISM AND TELEPHONE CALLS**

Cheyney also filed a motion in limine to preclude evidence of several anonymous acts, including car vandalism -- Prof. Gentner's tires were allegedly slashed -- and threatening phone calls allegedly received by Prof. Gentner. (N.T., dated 9/3/98, at 29-32).

After the parties' arguments, this Court granted Cheyney's motion, deciding to continue with its ruling from the first trial and preclude testimony of this nature unless Plaintiffs could show that these anonymous acts were in some way connected to Cheyney University.

Although the Court granted this motion, Prof. Gentner briefly mentioned one of the incidents during the trial:

Q: What happened after that, sir? Did anything else unusual happen with respect to any activities in the spring?

A: Well, there was an incident in the faculty parking lot of the science building

where my tires were slashed.

Q: Objection, your Honor. May I see you at sidebar?

THE COURT: Yes

(Sidebar discussion held on the record as follows:)

MR. LUDWIG: This court granted a motion in limine against the testimony Mr. Frost has elicited. I don't understand.

MR. FROST: Well, I didn't solicit that testimony. I mean, I asked him --

MR. LUDWIG: Did you instruct him about the order that was entered by the Court?

MR. FROST: Yes. Yes. Yes.

THE COURT: We'll strike it, and I'll tell the jury to disregard it, and I'll tell them the reason is because no one could ever tie that in to any particular individual.

MR. FROST: That's fine, your Honor.

(End of sidebar discussion.)

THE COURT: Members of the jury, I am sustaining the objection to the testimony about the tire slashings, and I have ruled on that prior to this, that it could not come in because there is no proof as to who or -- who did that. It could not be attributed to any particular individual, and for that reason I had ruled that it not come in, so I'm instructing you to disregard it. The objection is sustained.

(N.T., dated 9/10/98, at 198-99).

Despite Cheyney's claim to the contrary, this Court's curative instruction to the jury was sufficient to repair any

damage that may have occurred.

**D. EVIDENCE FROM FRED TUCKER ABOUT DR. JONES**

Cheyney further contends that this Court erred by permitting, over Cheyney's objection, hearsay testimony about Dr. Jones' personal views concerning his belief about hiring minority faculty members which, according to Cheyney, prejudiced the University.<sup>24</sup> In this regard, Cheyney's Director of Human Resources, Fred Tucker, testified that Dr. Jones discussed his belief that in order for Cheyney University students to receive a proper education, they should have African-American faculty. (N.T., dated 9/10/98, at 40-46).

Although it is understandable that Cheyney would find such statements made by Dr. Jones and recalled by Fred Tucker to be troubling, the testimony at issue could be found to reflect a willingness on Jones' part to stereotype and make negative decisions based on race.<sup>25</sup> See Roebuck, 852 F.2d at 733. In

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<sup>24</sup> Cheyney also asserts that "[w]hile Jones is entitled to hold the view that minorities were underrepresented in the Department, other than expressing his opinion, he never acted -- or caused action to be taken against plaintiffs -- based upon those views." Def.'s Brief at 65-66. This argument is nonsensical, since the determination as to whether Dr. Jones acted upon his personal beliefs is for the finder of fact to make, not Cheyney, the defendant in this case. Furthermore, the evidence in this case overwhelmingly supports a finding that Jones did act on his discriminatory views.

<sup>25</sup> Plaintiffs correctly argue that Jones' racist views regarding hiring practices and his racial animuses are highly relevant in demonstrating the hostile work environment that Plaintiffs endured, and since there was a question of fact as to

addition, Tucker's testimony is admissible under Rule 803(3) of the Federal Rules of Evidence, since statements of Jones' then existing state of mind are not excluded by the hearsay rule. In any case, Cheyney cannot credibly argue that any prejudicial impact was made on the jury when Dr. Jones, himself, testified that he believed that there should be more African-American teachers at Cheyney. (N.T., dated 9/15/98, at 8).

**X. JURY INSTRUCTION REGARDING DR. IMOGENE CHANG**

Cheyney contends that this Court improperly instructed the jury that it could find that Dr. Chang had engaged in unlawful conduct about which the University was aware:

With respect to Dr. Chang, I instruct you that as a matter of law, Dr. Chang was not a supervisor for purposes of Title 7, liability. Accordingly then, Cheyney University is responsible for her action only if higher officials at Cheyney knew or reasonably should have known about any unlawful conduct that she committed and failed to take prompt and effective action to stop it.

(N.T., dated 9/23/98, at 16-17).<sup>26</sup>

Counsel for Cheyney objected to the above instruction, arguing that "no actions by Imogene Chang on this record can result in Title 7 liability for Cheyney University." (N.T.,

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whether or not Jones was a supervisor, testimony of his views reported to Tucker could not be properly excluded.

<sup>26</sup> Cheyney correctly notes that there was a pretrial submission and argument to this Court regarding the preclusion of testimony of Dr. Chang. (N.T., dated 9/3/98, at 47-53).

9/23/98, at 26-27). In its memorandum, Cheyney asserts that this instruction deviated significantly from the testimony adduced at trial. Def.'s Brief at 53. In doing so, Cheyney focuses only on the evidence of Dr. Chang's complaint of sexual harassment against Prof. Gentner. Id. at 53-54. However, the evidence of record shows that during the second faculty search that took place in the Spring of 1992, Dr. Chang interrupted the search committee's interview with one of the candidates, attempted to disqualify him from consideration, and stated to Prof. Gentner, who was a member of that search committee: "You ruined my candidate. Now I'm going to ruin your candidate." (N.T., dated 9/10/98, at 205; N.T., dated 9/17/98, at 146-47). This comment by Dr. Chang provided direct causal evidence that she was trying to retaliate against Gentner and Stevenson for their speaking out against the hiring of Dr. Jenny Hsu from the first faculty search.

Moreover, Chang's unsubstantiated claims of racial and sexual harassment against Prof. Gentner could reasonably be interpreted by the jury as causing a hostile work environment. (N.T., dated 9/10/98, at 58-64). Dr. Chang also believed that Dr. Stevenson was harassing her, (N.T., dated 9/18/98, at 143-44), and her criticisms of Stevenson were included in the annual report issued by Dr. Jones to the Cheyney community with regard to allegations that Dr. Stevenson left hazardous chemicals and



dirty glassware in the chemical stock room which became a potential threat to the safe operation and use of Cheyney's chemistry facility. (N.T., dated 9/17/98, at 155-56).

#### **XI. ECONOMIC DAMAGES**

Defendant also challenges this Court's decision to permit testimony on economic damages or its consideration by the jury. Def.'s Brief at 70. Here, Cheyney argues that consideration of testimony from Plaintiffs' expert, Royal Bunin, following the denial of Defendant's motion in limine, prejudiced the University. (N.T., dated 9/17/98, at 2-14). Cheyney further argues that this Court should not have charged the jury relating to front pay because these damages were speculative and not part of a "make-whole" remedy.

With respect to Cheyney's motion in limine, the University's argument to this Court was two-fold: (1) as a matter of procedure, Cheyney claims that it did not have a fair opportunity to review, analyze, digest, question, and seek out their own expert in response to the updated version of Plaintiffs' expert report, and (2) as a matter of substance, Cheyney submits that speculative requests for damages should not be submitted to the jury, a seven percent increase in Plaintiffs' salaries was not supported by the record<sup>27</sup> and the methods set

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<sup>27</sup> While Plaintiffs' expert initially concluded that there had been increases in salary averaging 7 percent, recent documents submitted by defendants revealed a table of what the

out by Plaintiffs' expert with regard to offsets for pension benefits left the jury with misleading and speculative information.<sup>28</sup>

First, Cheyney was aware that Plaintiffs were intending to have an actuarial testify, having stipulated to the contents of Plaintiffs' expert report submitted at the first trial.

(Bunin Report, dated 1/10/96, Ex. A to Pls.' Opp'n Brief).

Second, Cheyney had been in possession of the previous reports submitted by Plaintiffs' expert well in advance of the second trial.<sup>29</sup> (N.T., dated 9/17/98, at 5; Exs. A & B to Pls' Opp'n

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actual increases were, showing that there was a freeze in increases for a period of time, which did reduce that percentage, and Plaintiffs' actuarial did take this into account in his latest report. (N.T., dated 9/17/98, at 6). In any case, what Cheyney characterizes as "entirely speculative testimony" goes to the credibility of the witness and defense counsel was given an opportunity to challenge Plaintiffs' expert on this point during cross-examination. (N.T., dated 9/18/98, at 24-26).

<sup>28</sup> Cheyney contends that Plaintiffs' expert reports and trial testimony did not provide calculations that included an offset for pension benefits. Def.'s Brief at 75. However, Plaintiffs point out that Mr. Bunin did account for such a deduction in the total numbers submitted in his expert report. (N.T., dated 9/18/98, at 30-31). Plaintiffs add that the testimony of Fred Tucker, Director of Human Resources at Cheyney, supports the calculations of Mr. Bunin. According to Mr. Tucker, the more years Plaintiffs worked, the higher the percentage of annual salary they received in pension benefits after retirement, each year increasing the amount by approximately two percent. In addition, Tucker testified that many of Plaintiffs' health benefits were reduced or lost when Plaintiffs were forced to resign. (N.T., dated 9/10/98, at 80).

<sup>29</sup> Plaintiffs calculate that Defendant had possession of Plaintiffs' expert reports for at least 282 days prior to the second trial and, thus, had notice that Plaintiffs resubmitted

Brief). Third, Cheyney's counsel did not intend to have an actuary or an economist testify on Defendant's behalf, but, at most, intended to use an expert to consult and advise him with respect to cross-examination. (N.T., dated 9/17/98, at 8, 12). Based on the above, this Court ruled as follows:

THE COURT: Well, I'll have to take time to look at the report, but I don't see that you're taken by surprise, because you knew a report, something was coming. And they say they've updated it, which I should think you would have expected. And they say that they have made adjustments according to objections you made to an earlier report.

So, you know, I'm inclined to let him testify, but I haven't had a chance to look at what they're -- made the comparisons. And I'm telling plaintiffs that here we go[] again. If what you tell me isn't accurate, because I don't have a chance to compare what you've done. But as a matter of principle if all you did basically was update your old report, then I'm inclined to let it go as it is and let their testimony in. But you know, we have to have candor in these trials at

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calculations were based on state law rather than federal law. In this regard, Plaintiffs point out that prior to the second trial, Plaintiffs submitted, without objection, a second report which changed the numbers of the original calculations to reflect two years of additional back pay, a new figure for front pay and increases in the pay scale at Cheyney. (Bunin Report, dated 11/4/97, Ex. B to Pls.' Opp'n Brief). When the second trial was continued until September 1998, Plaintiffs again submitted an updated report, adjusting the calculations to reflect the change in time. (Bunin Report, dated 9/11/98, Ex. C to Pls.' Opp'n Brief). Then, after the second trial began, Cheyney's counsel filed a motion in limine, alerting Plaintiffs' counsel that federal calculations were appropriate rather than state. As a result, Plaintiffs' counsel immediately had Mr. Bunin issue a fourth report recalculating all figures pursuant to present value and federal law. (Bunin Report, dated 9/16/98, Ex. D to Pls.' Opp'n Brief).

some point and if it's not correct, this is going to be the eternal case.

MR. ZEFF: Judge, just so you're clear as to what we've done, there was the original report at the first trial that was stipulated to. There is a report in January of -- there's a report which is January of '96, I believe. There is a report in '97 that updates the '96 report and that report changes the calculations as requested by defense in their motion to correct the calculations. So, the new report has different numbers than the other reports and that's what we've represented to the Court.

Also, your Honor --

THE COURT: Then I'm going to refuse the motion in limine.

(N.T., dated 9/17/98, at 13-14). Denying Cheyney's motion in limine was an exercise of this Court's discretion and, under these circumstances, cannot be considered a proper basis for discarding Plaintiffs' recovery of economic damages.<sup>30</sup> See Wilkins v. SEPTA, No. Civ. A. 96-2813, 1997 WL 700579, \*4 (E.D.

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<sup>30</sup> Although defense counsel has argued that his preparation for cross-examination of Plaintiffs' expert was prejudiced in that he was required to review and analyze an entirely new report as trial was underway, see Def.'s Brief at 74, Plaintiffs convincingly respond that the only changes to their expert's report were reductions in the future lost earning capacity, pension and fringe benefits to present value, which defendant argued was proper in this case. Pls.' Opp'n Brief at 106-07. Because the changes in calculations were made in accordance with Defendant's motion in limine, Plaintiffs contend that there was no surprise to the defense, since Plaintiffs agree with the defendant. (N.T., dated 9/17/98, at 6-7). Based on the above, this Court sided with Plaintiffs, finding it far more prejudicial to exclude Plaintiffs' expert testimony under these circumstances -- where the defense had known that Plaintiffs were going to be presenting such evidence, but delayed in objecting to the calculations until after the second trial started.

Pa. Oct. 31, 1997) (denying motion in limine to preclude expert testimony where failure to timely provide Plaintiff with a copy of expert report at issue was inadvertent, expert opinion presented evidence which moving party's expert was prepared to rebut, and moving party had opportunity to present opposing expert testimony), aff'd, 176 F.3d 474 (3d Cir. 1999); Trindle v. Sonat Marine, Inc., CIV. A. No. 85-7085, 1990 WL 893, \*6-9 (E.D. Pa. Jan. 5, 1990) (court, in applying the Meyers test, found no basis for granting of a motion for a new trial on the ground that expert was permitted to testify for the plaintiff); see also Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 905 (3d Cir. 1977) (exclusion of critical evidence is an extreme sanction, not normally imposed absent a showing of willful deception or flagrant disregard of a court order by the proponent of the evidence), overruled on other grounds, Goodman v. Lukens Steel Co., 777 F.2d 113 (3d Cir. 1985), aff'd, 482 U.S. 656 (1987).

## **XII. THE PARTIES' MOTIONS TO ALTER OR AMEND THE JUDGMENT**

The main issue with respect to Plaintiffs' Motion to Vacate this Court's Order, dated 10/1/98, and Defendant's alternative motion to alter or amend the judgments is whether an award of front pay is statutorily limited. Here, Plaintiffs argue that, on October 1, 1998, Tom Garrity, this Court's Deputy Clerk, represented in a telephone conference with counsel for

Plaintiffs that this Court was going to reduce the verdict in accordance with the Title VII cap on compensatory damages.<sup>31</sup> Later that same day, Plaintiffs state that, in a subsequent phone call from Mr. Garrity, the Court was going to record the full verdict and that it would be up to each counsel to file the appropriate post-trial motions to mold the verdict. However, on October 2, 1998, Plaintiffs' counsel was faxed a copy of an Order attested to by Mr. Garrity wherein the judgment entered by the jury was reduced for Fred Gentner from \$1,200,466.00 (front pay of \$488,789 plus back pay of \$306,677 plus compensatory damages of \$405,000) to \$911,677.00 and that the award for Robert Stevenson was reduced from \$977,784.00 (front pay of \$200,006 plus back pay of \$372,778 plus compensatory damages of \$405,000) to \$977,778.00, limiting the award of front pay to \$200,000 for each plaintiff.

Prior to jury selection, the parties entered into a stipulation before the court stating that Cheyney University had over 200 employees but less than 501 employees and that the State System of Higher Education ("SSHE") had over 500 employees. In this regard, 42 U.S.C.A. § 1981a(b)(3) provides the following:

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<sup>31</sup> After the verdict was read in the second trial, Counsel for Defendant requested that the Title VII statutory cap be applied to the amount of compensatory and front pay damages. In response, Counsel for Plaintiffs stated that the cap should only be applied to compensatory damages. (N.T., dated 9/23/98, at 37-38).

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed for each complaining party -- (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of the 20 or more calendar weeks in the current or preceding calendar year, \$200,000; and (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$300,000.

"In the provision immediately preceding the damages cap, the statute says: `Compensatory damages . . . shall not include back pay, interest on back pay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.' 42 U.S.C. § 1981a(b)(2). Section 706(g) authorizes district courts to order `reinstatement . . . with or without back pay . . . or any other equitable relief as the court deems appropriate.' Id. § 2000e-5(g)(1)." Because front pay is regarded as an equitable remedy available under section 706(g), it is excluded from the range of compensatory damages subject to the damages cap under section 1981a(b)(3). See Martini v. Federal Nat'l Mortgage Ass'n, 178 F.3d 1336, 1348-49 (D.C. Cir. 1999) ("Section 1981a(b)(2) therefore excludes front pay from the range of compensatory damages subject to the damages cap under section 1981a(b)(3)."); McCue v. Kansas Dep't of Human Resources, 165 F.3d 784, 792 (10th Cir. 1999) (same); Kramer v. Logan County

Sch. Dist. No. R-1, 157 F.3d 620, 626 (8th Cir. 1998) (same); but see Hudson v. Reno, 130 F.3d 1193, 1203-04 (6th Cir. 1997) (front pay is not authorized by the plain language of § 706(g) itself), cert. denied \_\_\_ U.S. \_\_\_, 119 S. Ct. 64 (1998).

While Defendant does cite Hudson in support of its position that a cap on front pay is appropriate, because the Third Circuit has viewed front pay as a form of equitable relief, see Hurst v. Beck, 771 F. Supp. 118, 123 (E.D. Pa. 1991) (citing Goss v. Exxon Office Sys. Co., 747 F.2d 885, 889 (3d Cir. 1984)), it should be excluded from the statutory limit on compensatory damages provided for in section 1981a(b)(3).

In Cheyney's post-trial motion, the University reasserts its position with respect to placing a cap on damages. Plaintiffs respond that if this Court deems it appropriate to cap compensatory damages, a \$300,000.00 cap rather than a \$200,000.00 cap is applicable, arguing that the second trial in this matter should have been against both Cheyney and SSHE or that the proper defendants should have been Cheyney University of SSHE, a joint employer.

As noted above, on January 27, 1998, this Court issued a decision denying Cheyney's Motion to Dismiss for Lack of Subject Matter Jurisdiction. In its Memorandum, this Court held that Cheyney's factual admission in its answer that it was an employer for purposes of Title VII served in part to establish



this Court's jurisdiction and, thus, was binding on defendants. Furthermore, Plaintiffs' claims in the second trial were litigated only against Cheyney University, not SSHE. As a result, the employer at issue, Cheyney University, is made up of more than 200 employees, but less 501, as stipulated to by the parties, requiring a cap of \$200,000 in compensatory damages for each plaintiff.<sup>32</sup>

Based on the above, the jury's original award of front pay will be reinstated. However, the jury's award of compensatory damages will be reduced to \$200,000.00 for each plaintiff, resulting in \$995,466.00 for Fred Gentner and \$772,784.00 for Robert Stevenson.

Finally, Cheyney has argued that the award of damages to Plaintiffs should be remitted because of a lack of evidence. See Spence v. Board of Educ. of Christina Sch. Dist., 806 F.2d 1198, 1201 (3d Cir. 1986) (remittitur is appropriate if the court finds that a decision of the jury is clearly unsupported and/or excessive). To the contrary, this Court finds that the testimony

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<sup>32</sup> Even if the reduction in damages from the first trial, as agreed upon by Plaintiffs, is taken into account, the amount of compensatory damages awarded in the second trial still turns out to be greater than the cap amount provided for in section 1981a(b)(3). Thus, when the compensatory damage awards of \$100,000.00 for Prof. Gentner and \$50,000.00 for Dr. Stevenson, which were given in the first trial, are subtracted from the awards of \$405,000.00 received by each plaintiff in the second trial, the amounts are still greater than the cap of \$200,000.00 and must be reduced accordingly.

and evidence presented at trial allowed the jury to reasonably conclude that Plaintiffs had suffered severe emotional distress, which manifested into physical ailments. (N.T., dated 9/11/98, at 87-88; N.T., dated 9/15/98, at 166-70, 198; N.T., dated 9/17/98, at 158-59, 167-69, 175-76); see also Becker v. Arco Chemical Co., 15 F. Supp.2d 600, 620 (E.D. Pa. 1998) (jury's award of \$170,000 in compensatory damages was neither excessive nor clearly unsupported in ADEA action in which employee testified, inter alia, to his feelings of humiliation as he was escorted from building by corporate security guards).

For all of the above reasons, Plaintiffs' Motion to Vacate this Court's Order, dated 10/1/98 will be granted, and Defendant's Motion for Judgment as a Matter of Law, or for a New Trial, or to Alter or Amend the Judgment will be denied. An appropriate order will follow.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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FRED GENTNER and  
ROBERT STEVENSON,

Plaintiffs,

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|-----------------------|---|--------------------------|
| v.                    | : | CIVIL ACTION NO. 94-7443 |
|                       | : |                          |
| CHEYNEY UNIVERSITY OF | : |                          |
| PENNSYLVANIA,         | : |                          |
|                       | : |                          |
| Defendant.            | : |                          |
| <hr/>                 | : |                          |

**ORDER**

AND NOW, this 14th day of October, 1999, upon consideration of Plaintiffs' Motion to Vacate this Court's Order, dated 10/1/98, and Defendant's Motion for Judgment As A Matter Of Law, Or For A New Trial, Or To Alter Or Amend The Judgment, and all responses thereto, it is hereby ORDERED that Plaintiffs' post-trial motion is GRANTED as follows:

1. The Judgment entered by this Court on October 1, 1998, is hereby VACATED;

2. Judgment in the above-captioned matter is hereby entered in favor of Plaintiff Fred Gentner and against the Defendant in the total amount of \$995,466.00 (which consists of \$488,789.00 in front pay, \$306,677.00 in back pay and \$200,000.00 in compensatory damages); and

3. Judgment in the above-captioned matter is hereby entered in favor of Plaintiff Robert Stevenson and against the Defendant in the total amount of \$772,784.00 (which consists of \$200,006.00 in front pay, \$372,778.00 in back pay and \$200,000.00 in compensatory damages).

It is further ORDERED that Defendant's Motion for

Judgment As A Matter Of Law, Or For A New Trial, Or To Alter Or  
Amend The Judgment is DENIED.

BY THE COURT:

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ROBERT F. KELLY, J.